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June 8, 2012

Hon. Edward L. Hogshire, Judge
Charlottesville Circuit Court
315 East High St.
Charlottesville, VA 22902

Re: **Commonwealth v. George Huguely**
Commonwealth Response to Motion to Set Aside

Dear Judge:

Accompanying this note is the Commonwealth's Response to the Defendant's Motion to Set Aside the Verdicts in the Huguely case.

In light of the of the unavailability of a transcript of the proceedings, with the exception of the jury selection portions, the Commonwealth requests leave to supplement its Response after review of the transcript.

The Commonwealth would urge that no decisions be taken in relation to the Motion and the Response without a transcript of the proceedings being available to the Court and counsel.

Sincerely yours,

Warner D. Chapman

C: Francis McQ. Lawrence
Rhonda Quagliana

6-8-12

IN THE CIRCUIT COURT FOR THE CITY OF CHARLOTTESVILLE

COMMONWEALTH OF VIRGINIA

V. CASE NO. 11-102

GEORGE HUGUELY,
DEFENDANT

COMMONWEALTH RESPONSE TO MOTION TO SET ASIDE THE VERDICTS

NOW COMES the Commonwealth, by counsel, and hereby responds to the defendant's Motion to Set Aside the Verdicts.

In doing so the Commonwealth notes for the Court that with the exception of the portion of the record relating to jury selection a transcript of the proceedings is unavailable. As a result, the Commonwealth requests and reserves the right to supplement this Response with authoritative references to the trial record when a full transcript becomes available.

I.

Alleged Violation of Sixth Amendment Right to Counsel of Choice

The defendant's Motion makes use of an Unofficial Transcript (UT) of the trial proceedings. The Commonwealth does not have access to the UT and is unable to authoritatively identify specific portions of the transcript that illustrate countervailing considerations relating to Ms. Quagliana's illness and the events that actually took place in Court to accommodate that fact.

Because of Ms. Quagliana's unavailability the jurors were required to participate in an unanticipated third week of trial. The Court was faced with the certainty that trial proceedings

could not resume until February 22nd, if they were suspended for the week on the 16th or 17th. Each day of delay increased the risk that a juror might be unable to continue in the case as a result of accident, illness, or taint. Unless the Court took steps to accomplish as much as possible on the 16th, 17th, and 18th of February the presentation of evidence would have been suspended entirely between February 15th and 22nd. A delay of that magnitude would have separated the jurors considerably from the Commonwealth's evidence and the effect of cross-examination of those defense witnesses who testified before trial proceedings were postponed. Ms. Quagliana had available to her a privately retained court reporter to enable her to review any portion of the proceedings she missed. In her absence Mr. Lawrence examined only those witnesses for whom he advised the Court he was responsible for and prepared. The defense was not required to deviate from the division of functions they described to the Court. Ms. Quagliana was able to examine each witness for whom she was responsible and prepared. There is no evidence that the nature and quality of the defense was impacted negatively.

Affecting the Court's analysis of the appropriate response to Ms. Qualiana's illness was the certainty that on February 17th subpoenas for Commonwealth witnesses were scheduled to expire. This was known to the defense. The Commonwealth's ability to manage this material complication necessitated special appearances by witnesses to be recognized by the Court for an appearance date after the 17th of February. Their availability for later proceedings became subject to their willingness to cooperate rather than compulsory process. These witnesses included an out of state witness, Gavin Gill, who had to remain in Charlottesville between the 17th and the 22nd and two other out of state witnesses, Claire Bordley and Stephanie Aladj, who

had to extend their stays in Charlottesville initially and then return to Charlottesville from their Maryland and the District of Columbia residences.

Regarding Ms. Quagliana's medical status it is known to the Court that she was working on the case during her absence. In fact, in returning urgent telephone messages from Mr. Lawrence on the evening of February 17th regarding Ms. Quagliana's impermissible contact with defense witnesses, she was the person who answered the phone at her law office on two occasions. These calls were returned to the law offices by the Commonwealth Attorney and an Assistant Commonwealth Attorney, Elizabeth Killeen. When trial proceedings resumed on February 18th, no objection related to Ms. Quagliana's condition was made to going forward that day.

The Court utilized sound discretion in its rulings relating to Ms. Quagliana's illness in the exercise of its responsibility to manage fairly and appropriately the trial proceedings. The record does not evidence any prejudice to the defendant from the Court's rulings whatsoever.

The decision whether to grant a continuance "is a matter within the sound discretion of the trial Court." A two-pronged test has been established by the Virginia Supreme Court "for determining whether a trial court's denial of a continuance request is reversible error." It must appear from the record "(1) that the court abused its discretion and (2) that the movant was prejudiced by the court's decision." Silcox v. Commonwealth, 32 Va. App. 509, 513, 528 S.E. 2d 744 (2000). The court's discretion is abused, however, when the record reflects "an unreasoning and arbitrary insistence upon expeditiousness in face of a justifiable request for a delay(.)" Mills v. Commonwealth, 24 Va. App. 95, 99-100, 480 S.E. 2d 746 (1997).

The Silcox case involved a factual scenario in which out of state counsel, who the defendant retained to be lead counsel, was unavailable for the scheduled trial date and the case went forward with the participation of both local counsel who previously served as lead counsel and a second local attorney who the defendant sought to substitute for the first. 32 Va. App. at 512-514. The Court of Appeals found neither prejudice resulting from the denial of the requested continuance nor an abuse of the court's discretion. 32 Va. App. 513-514.

The Mills case involved a request for continuance for the purpose of retaining different counsel. In that case the Court of Appeals held that the trial court abused its discretion upon finding that the record of the proceedings supported a conclusion that the attorney who the defendant sought to discharge conducted inadequate investigation, was unprepared, and exhibited a "nearly total failure to communicate with his client." 24 Va. App. at 100-101.

In support of his Motion to Set Aside the Verdicts for reasons related to Ms. Quagliana's illness the defendant relies on United States v. Gonzalez-Lopez, 548 U.S. 140, 126 S. Ct. 2557 (2006), as authority for the proposition that the defendant need not demonstrate prejudice or abuse of discretion in this case.

In actuality, Gonzalez-Lopez has not been applied in that manner. Gonzalez-Lopez establishes only that where retained counsel of choice has been erroneously denied, the Sixth Amendment requires no proof of prejudice or ineffective assistance resulting from the performance of counsel to justify a new trail. Error was conceded by the government in the Gonzalez-Lopez case in relation to the decision to prohibit retained counsel from participating in the case. 126 S. Ct. at 2561. As a result, the issues before the United State Supreme Court related to the government's contention that "the Sixth Amendment violation is not 'complete'

unless the defendant can show that substitute counsel was ineffective" or "that his counsel of choice would have pursued a different strategy that would have created a 'reasonable probability that the result of the proceedings would have been different." 126 S. Ct. at 2561, citing Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052 (1984).

In cases decided after Gonzalez –Lopez it is clear that the law relating to the threshold determination, whether a court's decision affecting the status or participation of retained counsel, remains unchanged. The applicable standard is whether the court abused its discretion in relation to the action affecting the participation of counsel.

Determining whether a court ruling relating to the status or participation of retained counsel is wrong or erroneous is a balancing process involving,

> ....balancing the defendant's 'constitutional right to retain counsel of choice against the need to maintain the highest standards of professional responsibility, the public confidence in the integrity of the judicial process and the orderly administration of justice.' United States v. Mendoza –Salgado, 964 F.2d 993, 1015 (10th Cir. 1992) (alteration in original) (quoting United States v. Collins, 920 F. 2d 619, 626 (10th Cir. 1990)). In striking that balance we consider whether: 1) the continuance would inconvenience witnesses, the court, counsel, or the parties; 2) other continuances have been granted; 3) legitimate reasons warrant a delay; 4) the defendant's actions contributed to the delay; 5) other competent counsel is prepared to try the case; 6) rejecting the request would materially prejudice or substantially harm the defendant's case; 7) the case is complex; and 8) any other case-specific factors necessitate or weigh against further delay. Id. at 1015.

United States v. Flanders, 491 F. 3d 1197, 1216 (10th Cir. 2007).

In finding that the lower court did not abuse its discretion in denying a requested continuance in the Flanders case the Court of Appeals found "no evidence that the district court's denial was due to unreasonable or arbitrary concerns." 491 F. 2d at 1216. In so holding the Court cited with approval the language and reasoning contained in both the Virginia two-

pronged test and the Gonzalez-Lopez decision itself. Concerning a court's broad discretion relating to matters involving continuances the Court stated "only an unreasoning and arbitrary insistence upon expeditiousness in the face of a justifiable request for delay violates the right to the assistance of counsel." Morris v. Slappy, 461 U.S. 1, 11-12, 103 S.Ct. 1610, 75 L.Ed2d 610 (1983) (quotation omitted); see also Gonzalez-Lopez, 126 S.Ct. at 2565-66 (recognizing 'a trial court's wide latitude in balancing the right to counsel of choice against the needs of fairness and against the demands of its calendar")(citation omitted). 491 F. 3d at 1216.

Flanders was a case in which the district court denied a continuance and required the defendant's previously appointed attorney to "remain as defense counsel alongside (his) newly hired counsel." 491 F.3d at 1215.

The same analysis and the same standard was applied by the Court of Appeals for the 9th Circuit in the case of United States v. Ensign, 491 F.3d 1109 (9th Cir. 2007). Referring expressly to the Gonzalez-Lopez language cited by the Flanders court, the 9th Circuit in Ensign upheld the denial by the district court of leave for newly retained counsel to participate. In so holding the 9th Circuit wrote,

> ...the district court's denial of Ensign's motion was a reasonable exercise of its wide latitude in balancing the right to counsel against the demands of the court's calendar in an effort to maintain the fair, efficient and orderly administration of justice. *See, Gonzalez-Lopez*, 126 S. Ct. at 2565-66. The district court's order denying Ensign's motion to appoint Stilley *pro hac vice* is affirmed.

491 F. 3d at 1115.

This Court should not be confused by the reference to Stilley's appointment *pro hac vice* as suggesting Ensign sought Stilley's appointment on the basis of indigency. The record is unequivocal that Stilley was retained by Ensign. 491 F. 3d at 1112.

Applying either Virginia's two-pronged standard or Flanders multi-pronged approach to the facts of this case it is unmistakable that this Court did not make its rulings out of an unreasoning and arbitrary insistence on expeditiousness. The Court exercised reasonable discretion that balanced the rights of the defendant with legitimate concern for the status of witnesses, the parties, the competence of defense counsel who was well prepared to go forward with witnesses who were his admitted responsibility, the effect of further lengthy delay on the essential fairness of the production of evidence, and due regard for the special circumstances of a highly publicized trial in which the risk of juror taint from some source was ever present. No prejudice or adverse impact to the defendant has been shown because none occurred.

II.

Alleged Failure to Strike Jurors for Cause

The Defendant has moved for a new trial and in support whereof argued that the Court erred in seating jurors 31, 32, 35, 36, 72, 182 and 211. The Defendant's motion is without merit and should be denied.

The Commonwealth agrees that the right of an accused to a trial by an impartial jury is a constitutional right guaranteed under both the United States Constitution in the Sixth Amendment and the Virginia Constitution in article I, section 8. The Rules of the Supreme Court of Virginia as well as legislative enactments reinforce this guarantee. See Code §§ 8.01-357; 8.01-358; 19.2-260 et seq.; Rule 3A:14(a); Brown v. Commonwealth, 510 S.E.2d 751, 29 Va.App. 199 (Va. App., 1999). "It is the duty of the trial court, through the legal machinery

provided for that purpose, to procure an impartial jury to try every case." Salina v. Commonwealth, 217 Va. 92, 93, 225 S.E.2d 199, 200 (1976).

However, " '[i]t is not uncommon to discover during voir dire that prospective jurors have preconceived notions, opinions, or misconceptions about the criminal justice system, criminal trials and procedure, or about the particular case.' " Cressell v. Commonwealth, 32 Va.App. 744, 761, 531 S.E.2d 1, 9 (2000) (quoting Griffin v. Commonwealth, 19 Va.App. 619, 621, 454 S.E.2d 363, 364 (1995)). "The opinion entertained by a juror, which disqualifies him, is an opinion of that fixed character which repels the presumption of innocence in a criminal case, and in whose mind the accused stands condemned already." Justus v. Commonwealth, 220 Va. 971, 976, 266 S.E.2d 87, 91 (1980) (citation omitted and emphasis added). Thus, " 'the test of impartiality is whether the venireperson can lay aside the preconceived views and render a verdict based solely on the law and evidence presented at trial.' " Cressell, 32 Va.App. at 761, 531 S.E.2d at 9 (quoting Griffin, 19 Va.App. at 621, 454 S.E.2d at 364). Lovos–Rivas v. Commonwealth of Virginia, 58 Va. App. 55, 707 S.E.2d 27 (Va. App., 2011).

If the Court found as in the instant case that each venireperson stood indifferent to the charge and could render a fair and impartial verdict based solely upon the evidence and the law then "the trial court's decision whether to strike a prospective juror for cause is a matter submitted to its sound discretion and will not be disturbed on appeal unless it appears from the record that the trial court's action constitutes manifest error." Stockton v. Commonwealth, 241 Va. 192, 200, 402 S.E.2d 196, 200, cert. denied, 502 U.S. 902, 112 S.Ct. 280, 116 L.Ed.2d 231 (1991).

The trial court has this discretion because the trial court has "opportunity to observe each juror's demeanor when evaluating the juror's responses to the questions of counsel and the questions of the trial court." Id. at 200, 402 S.E.2d at 200. "Any reasonable doubt regarding the prospective juror's ability to give the accused a fair and impartial trial must be resolved in favor of the accused." Gosling v. Commonwealth, 7 Va. App. 642, 645, 376 S.E.2d 541, 544 (1989) (citations omitted).

The use of questionnaires in this case was approved by the Court in its sole discretion in response to the Defendant's motion. The use of questionnaires in this case provided counsel an opportunity to receive more information about the venire than is usually available to counsel. The questionnaires were filled out at jury orientation for the term. The questionnaires were not from the Commonwealth's point of view intended to be the beginning of voir dire. They were a way to gather more information about each venireperson so voir dire could be efficiently conducted. It is a mistake to assume that the answers contained in each questionnaire would somehow act as a substitute for voir dire. The Court must be given the opportunity to observe each juror's demeanor when evaluating the juror's responses to the questions of counsel and the questions of the trial Court. Stockton v. Commonwealth, 241 Va. at 200. Jurors 31, 32, 35, 36, 72, 182 and 211 completed the questionnaires. Each of these jurors indicated that the questionnaire was correct and were given the opportunity to point out corrections during voir dire.

The defendant objected to Juror 31 because of Juror 31's exposure to violence in her chidhood. When asked about her exposure to violence the juror's responses left no doubt in the

Court's mind about her ability to serve as a juror. The juror informed the Court that she was exposed to violence in her childhood home. The Juror explained that the events occurred more than 30 years ago and indicated about those events - "no, not that would affect me to this day, no." TT at 210. Juror 31 went on to explain "I separated that from my life a long time ago. You know, it's thirty-five (35) years ago. It's more than a lifetime ago. I was a child. You know, it is---it is kind of what made me who I am today but I think in a way it made me stronger so I don't see it as something that affects me on a daily basis at all, [or] that colors my perceptions of other things. (TT at p. 213). In responding to the defendant's motion to strike Juror 31 for cause Judge Hogshire said "I read her demeanor very differently. I think she was someone who is very strong and very definite in her answers. I don't think there's---I don't have any reasonable doubt that she would be a good juror and on that basis certainly, so I'm going to overrule that motion and note your exception." (TT at p. 217). The Court was acting within its discretion when the Defendant's motion was overruled and no manifest error was committed. "Because the trial judge has the opportunity, [...] to observe and evaluate the apparent sincerity, conscientiousness, intelligence, and demeanor of prospective jurors first hand, the trial court's exercise of judicial discretion in deciding challenges for cause will not be disturbed on appeal, unless manifest error appears in the record. Stockton v. Commonwealth, 241 Va. at 200.

The defendant argues that Juror 32 should have been excused for cause because she at one time held an opinion about the case and held that opinion when completing the questionnaire. The motion by the defendant as to Juror 32 was properly denied as the legal standard espoused in the motion is incorrect. In Briley v. Commonwealth , 222 Va. 180 (1981), the Supreme Court provided a clear statement of the law concerning juror opinions. Briley

asserted that two jurors should have been struck for cause because they at one time prior to the commencement of the trial formed an opinion about the case. The Virginia Supreme Court held that:

> "In these days of swift, widespread and diverse methods of communication, an important case can be expected to arouse the interest of the public in the vicinity, and scarcely any of those best qualified to serve as jurors will not have formed some impression or opinion as to the merits of the case. This is particularly true in criminal cases. To hold that the mere existence of any preconceived notion as to the guilt or innocence of an accused, without more, is sufficient to rebut the presumption of a prospective juror's impartiality would be to establish an impossible standard. It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court. (Citations omitted.)"

Id. at 186 (quoting, Irvin v. Dowd, 366 U.S. 717, 722-23, (1961).

The Defendant argues that Juror 35 was equivocal about his answers concerning his ability to be a fair juror. The Defendant's argument fails to acknowledge that all of Juror 35's answers should be evaluated in the context of the questioning. For example Juror 35 responded as follows to questions about alcohol:

> MS. QUAGLIANA: Is there anything about alcohol use or young people using alcohol, including your experiences at the University of Virginia, that would affect your judgment in a case in which evidence was offered that both Mr. Hugucly and Ms. Love were using alcohol?
>
> JUROR NUMBER 35: Well, I live in a university neighborhood and I'm aware that university students use alcohol. That wouldn't shock me to learn that.

MS. QUAGLIANA: If we presented testimony to you that Ms. Love used alcohol or if we presented other uncomplimentary testimony about her to demonstrate things about the nature of her relationship with Mr. Huguely, to tell you things about his motives, would you think that we were doing that to blame the victim or would you have reservations about our case because you felt like we were blaming the victim?

JUROR NUMBER 35: I'd have to think about it. I don't think I can give a very good answer to that. I am aware that UVA students, not all but some, use alcohol and some use it too much. I'm well aware of that. I think it wouldn't shock me if you brought that out in the case of anybody involved in the trial. Would I automatically think you were---

MS. QUAGLIANA: Attacking her or blaming her.

JUROR NUMBER 35: Blaming her. I don't think so. I---

MS. QUAGLIANA: That wouldn't cause you to disfavor our side or anything?

JUROR NUMBER 35: I don't think so, no.

(TT at p. 75.) The preceding example if you stopped at the point at which Juror 35 said I'd have to think about it and failed to read through to the bottom of the selected colloquy you might conclude that the juror was equivocating. However if you read to the end of the passage you find that Juror 35 was quite sure about his ability to be an impartial juror.

The Court found that the juror was not equivocating but was sure about his ability to be an impartial juror. The Court pointed out that "... in each of [Juror 35's] answers he concluded with the thought that he could be fair in each instance, that he didn't think lacrosse players or athletes were more violent, that he thought he would be able---that he would not hold it against the defense if you put on evidence as to alcohol. To me, he---I don't really have a reasonable doubt about his fairness, so I'm going to overrule the motion to strike and note your exception." (TT at p. 81.) The Court in explaining his reasons affirmed that he "[observed] and [evaluated] the apparent sincerity, conscientiousness, intelligence, and demeanor of [the prospective juror] first hand and determined that he would be an impartial juror." Stockton v. Commonwealth, 241 Va. at 200.

The Defendant claims that Jurors 36, 72 and 211 should have been stricken for cause. The Defendant's motion misses the mark as to these jurors as well. Juror 36 was said to have equivocated in her answers concerning alcohol. This is an inaccurate description of her answers concerning alcohol and young people. Juror 36 was asked specific questions about alcohol and responded that she does not. Juror 36 went on to say:

JUROR NUMBER 36: I would just have my thoughts about young people and drinking.

MR. CHAPMAN: And the thoughts that you have about that are what?

JUROR NUMBER 36: Well, I think it's---I think they are doing it just a little bit too much at this, you know.

MR. CHAPMAN: People generally or---

JUROR NUMBER 36: Yeah, yeah, just young people generally.

THE COURT: Are you having trouble hearing?

JUROR NUMBER 36: You can't hear me?

THE COURT: She says she thinks that people are doing it a bit too much.

JUROR NUMBER 36: Yeah.

MR. CHAPMAN: And when you say that, are you talking about---

JUROR NUMBER 36: Just generally.

MR. CHAPMAN: ---society generally?

JUROR NUMBER 36: Just generally, young people generally.

MR. CHAPMAN: Now do you sort of by definition think ill of people who---

JUROR NUMBER 36: No, no, no, not at all.

Juror 36 could not have been clearer about her feelings about alcohol use by young people. Juror 36 concluded that she thought some young people drank too much but that she did not hold an ill definition of the young people that drank too much. Juror 36 was non-judgmental as it related to alcohol and alcohol in this case. The Court ruling was absolutely correct in this circumstance pointing out that the answers were general thoughts about alcohol and that those answers did not create any doubt in the Courts mind about her fitness to serve as a juror.

The Defendant makes much of the Brown case and quotes its language out of context. The juror in question in Brown v. Commonwealth, 29 Va. App 199, 208 (1999), was employed as the Chief Counsel to the United States Secret Service. During the voir dire in the Brown case Prospective Juror 2 as he was referred to by the court stated "I think it's a fair statement, and I do feel that it would be unusual that the police would make an arrest, that there would be an indictment, and that it would get all the way to trial — the great likelihood, based on my experience, is, yes, the person probably did it." Id. In contrast Juror 36 was not personally involved in law enforcement or court administration. Juror 36 has a son that is a juvenile probation officer. The fact that Juror 36 was not a law enforcement official and a parent of a law enforcement official nullifies the applicability of Brown as to Juror 36.

Similarly Juror 72 was said to have been too close to issues involving alcohol. Juror 72 was sure that she could listen to the evidence and make a decision based upon the evidence alone. At the end of the individual voir dire for Juror 72 Ms. Quagliana asked:

> MS. QUAGLIANA: And I'm just about finished so let me just add, so the right side of the brain is saying I can be fair and rational and it seems like there's a left-sided brain that may have some reservations about that given your personal experience and that's what I'm hearing.
>
> JUROR NUMBER 72: **No, I don't think there is**. All I'm saying is that I'm a complete human being and I come to this with experience. I don't think I would feel it necessary to use my experience to make judgments about what happened in this courtroom. [Emphasis added.]

TT at p. 546. Juror 72's answer was clear and concise statement of fact concerning her ability to serve as a juror. In reply the Defendant returns to DeHart v. Commonwealth, 19 Va. App. 139 (1994). The DeHart court reversed the conviction because the trial court failed to strike a juror who could not state that she would base her decision solely upon the evidence produced in court and not let media reports influence her decision. Id at. 141. In contrast to DeHart Juror 72 tells us in her own words that she can make a decision based upon the law and evidence produced in the trial. (TT at p. 542.)

Juror 182 was clear and precise in his answers to the Court and counsel and did not provide a basis for exclusion as a juror. (TT at p. 748-757.) Juror 182 did not give equivocal answers. His association with the University is not in and of itself a basis for inclusion or exclusion from the venire. Counsel's motion at trial was properly denied by the Court. (TT at p 757.)

Finally, the Defendant moves the Court to order a new trial because the Court failed to strike Juror 211. First the motion to strike Juror 211 was a motion made without any rational basis in fact or law. Ms. Quagliana rose and stated that she would make a motion to strike Juror 211 for the record in essence because the Juror 211 was employed by the University of Virginia. (TT at p. 276.) The statement by counsel that the motion to strike was 'for the record' was a tacit acknowledgment that the legal basis for the motion was dubious. Juror 211 gave no answer that placed into question her ability to listen to the evidence and decide the case upon that basis alone. The Court agreed and stated "All right. Ms. Quagliana, there's not a shred of indication

that this juror cannot be objective. I'm going to note your exception but the motion is overruled."

The Defendant has failed to state a sufficient legal basis for the Court to include that manifest error was committed. Therefore, the Defendant's motion should be denied.

III.

Alleged Impermissible Limitations on Voir Dire

A criminal defendant has no right to individual voir dire; the trial courts have broad discretion to decide how to conduct voir dire. Fisher v. Commonwealth, 236 Va. 403, 410, 374 S.E.2d 46, 50 (1988). Prior to trial the Court approved the Defendant's proposed question about victim blaming for use during voir dire. At the outset and without the context of jury selection the question seemed reasonable. However, as the question was asked over the course of voir dire it became clear that the question was taken to be a question about trial tactics[1] and the Commonwealth objected to the continued use of the victim blaming question. The question as asked was so broad in its construction that the question was ambiguous and yielded meaningless answers. The Court sustained the Commonwealth's objection.

[1] Example of the Victim blaming question and answer.

MS. QUAGLIANA: If we offered testimony about Yeardley Love's consumption of alcohol, or if we presented testimony or evidence that seemed uncomplimentary toward her or her behavior and we did that to explain to you the nature of her relationship with Mr. Huguely and his relationship with her, explained to you things about his motives, would you think that the defense was blaming the victim? Did you have a different answer to that?

JUROR NUMBER 34: Well, I understand the question but I don't—would you repeat it, please?

MS. QUAGLIANA: I will. What I'm trying to make sure of is I want to know if we presented testimony or cross-examined witnesses or did anything to bring out information about Ms. Love's behavior, her drinking, or anything of that nature and it seemed to be uncomplimentary in some fashion, would you think that we were blaming the victim or attacking the victim?

JUROR NUMBER 34: It might depend on how you presented it. (TT at p 371).

Trial courts must afford a party a "full and fair" opportunity to ascertain whether prospective jurors "stand indifferent in the cause." LeVasseur v. Commonwealth, 225 Va. 564, 581, 304 S.E.2d 644, 653 (1983), cert. denied, 464 U.S. 1063, 104 S.Ct. 744, 79 L.Ed.2d 202 (1984). However, it is within the trial court's sound discretion to decide when a defendant has had such an opportunity. Id., 304 S.E.2d at 653. Further, trial courts are not required to allow counsel to ask questions which are so ambiguous as to render the answers meaningless. See Id. 225 Va. at 579, 304 S.E.2d at 652-53. Buchannan v. Commonwealth, 238 Va. 389, 401 (1989)

IV.

Denial of Request for Individual Sequestered Voir Dire

A defendant does not have a constitutional right to individual voir dire. Cherrix v. Commonwealth, 257 Va. 292, 300, 513 S.E.2d 642, 647 (citing Stewart, 245 Va. at 229, 427 S.E.2d at 399), cert. denied, 528 U.S. 873, 120 S.Ct. 177 (1999). Like in the Bell case, in this case the Court permitted "extensive questioning of the prospective jurors with regard to the factors listed in Code § 8.01-358" that were "sufficient to preserve (the) right to a fair and impartial jury. Bell v. Commonwealth, 264 Va. 172, 195 (Va., 2002). The decision to conduct individual or group voir dire is left to the court's discretion. Fisher v. Commonwealth, 236 Va. 403, 410, 374 S.E.2d 46, 50 (1988).

It follows that there is no right to the more extreme measure of closed individual voir dire. Moreover, a decision to close a portion of a trial to the public is fraught with problems of a

constitutional nature. See Press-Enterprise Co. v. Superior Court of Cal., 464 U.S. 501, 104 S.Ct. 819, 78 L.Ed.2d 629 (1984); Buchannan v. Commonwealth, 238 Va. 389 (1989).

Procedurally, the Court provided the Defendant and the Commonwealth with both group and individual voir dire. The Defendant and the Commonwealth were provided with great latitude in conducting voir dire. A review of the transcript will reveal that the Defendant was given ample opportunity to explore each juror's qualifications. The Court afforded the Defendant every Constitutional protection in the jury process. Where a trial court affords ample opportunity to counsel to ask relevant questions and where the questions actually propounded by the trial court were sufficient to preserve a defendant's right to trial by a fair and impartial jury, we will generally not reverse a trial court's decision to limit or disallow certain questions from defense counsel. See LeVasseur, 225 Va. at 582, 304 S.E.2d at 653; Mackall v. Commonwealth, 236 Va. 240, 251, 372.

V.

Denial of Request to Sequester the Jury

The question whether to sequester the jury is entrusted to the sound discretion of the trial court and its decision in that regard will not be disturbed absent a showing of an abuse of discretion. See e.g., Pope, 234 Va. at 121, 360 S.E.2d at 357; Gray, 233 Va. at 340, 356 S.E.2d at 172; Jones v. Commonwealth, 228 Va. 427, 442-43, 323 S.E.2d 554, 562 (1984), cert. denied, 472 U.S. 1012, 105 S.Ct. 2713, 86 L.Ed.2d 728 (1985). The trial court did not abuse its discretion. At the end of each day of trial, the court admonished the jury not to read the newspapers, watch television, or discuss the case with anyone. The jurors were admonished at

each break in trial not to read the newspapers, watch television, or discuss the case with anyone. The Court asked jurors at the resumption of trial each day if they complied with the Court's admonition. Unless it is shown otherwise, it is presumed that jurors follow the trial court's instructions to avoid exposure. See Jones, 228 Va. at 443, 323 S.E.2d at 562; Waye v. Commonwealth, 219 Va. 683, 701, 251 S.E.2d 202, 213, cert. denied, 442 U.S. 924, 99 S.Ct. 2850, 61 L.Ed.2d 292 (1979).

There was no evidence produced that a juror did not comply with the Court's instructions. The Defendant has not produced any evidence to the contrary. As such the Defendants motion for trial on this ground must be denied.

VI.

Refusal of Language Requested as to Malice Instruction

The malice instruction given by the Court fully and correctly instructed the jury regarding the issue of malice. The instruction was taken *ver batim* from the Model Jury Instructions.

The defendant alleges it was error to fail to include within the instruction the following language relating to malice.

> It is not confined to ill will to any one or more particular persons, but is intended to denote an action flowing from a wicked or corrupt motive, done with an evil mind and purpose and wrong intention, where the act has been attended with such circumstances as to carry in them the plain indication of a heart regardless of social duty and fatally bent on mischief.

With the exception of this language the defendant's proffered instruction conformed to the Model Instruction that was given.

Significantly, the defendant's Motion omits mention of the relationship between the archaic language appearing above and the final sentence of the full Model Instruction that, "Malice may be inferred from any deliberate willful and cruel act against another, however sudden." This latter concept is retained in the Model Instruction while the archaic references appearing above have been eliminated from it in likely recognition of their susceptibility to varying interpretations and confusion among jurors. The final sentence of the Model Instruction encapsulates this entire aspect of malice while avoiding a source of confusion and varying interpretations.

The requested language has never been carefully scrutinized in Virginia cases. In cases in which this language appears it is associated with factual scenarios in which the accused inexplicably lashes out violently towards those nearest at hand in the absence of a preexisting source of hard feeling toward the victim or does so with extreme disproportionality in comparison to the source of motivation underlying behavior. The requested language may be described as relating to a "depraved heart" theory of murder. See, Roger D. Grout, Criminal Offenses and Defenses in Virginia (2005 Edition), Second Degree Murder, Sec. 6, page 420, citing Pierce v. Commonwealth, 135 Va. 635, 115 S.E. 686 (1923) (rev'd on other grounds).

A "depraved heart" theory of malice was neither raised by the evidence in this case nor argued by the parties. The evidence and argument of counsel at trial was related to the relationship between George Huguely and Yeardley Love and the events that affected their relationship over a specific period of time beginning in February 2010 with an assault committed by the Huguely and culminating in May 2010 with the events immediately surrounding Yeardley Love's death, including the defendant's own description of those events. The issue of malice in

this case had to do with the intentional and volitional behavior of George Huguely toward Yeardley Love or, as the defense contended, a lesser degree of culpability such as criminal negligence.

A.

Origin of the Defendant's Requested Language

The language requested by the defendant for inclusion in the malice instruction derives from the 1850 case of Commonwealth v. Webster, 5 Cush. 295, 59 Mass. 295 (1850), involving the murder and dismemberment of a chemistry professor at the medical college at Cambridge by a physician who was a fellow faculty member. Parts of the deceased's dismembered body were found in the defendant's laboratory at the medical college, including an "assay" furnace of the laboratory. The defendant was indebted to the deceased, who was known to have pressed him for payment. On the day the deceased disappeared the defendant left word at his residence that if he would come to the medical college on that day he would be paid.

Describing in general terms the distinction in the common law of Massachusetts between murder and manslaughter Chief Justice Shaw described murder as encompassing,

> ...in the sense in which it is now understood, is the killing of any person in the peace of the commonwealth, with malice aforethought, either express or implied by law. Malice, in this definition, is used in a technical sense, including not only anger, hatred, and revenge, but every other unlawful and unjustifiable motive. It is not confined to ill-will towards one or more individual persons, but is intended to denote an action flowing from any wicked and corrupt motive, a thing done malo animo, where the fact has been attended with such circumstances as carry in them the plain indications of a heart regardless of social duty, and fatally bent on mischief. And therefore malice is implied from any deliberate or cruel act against another, however sudden.

Commonwealth v. Webster, 59 Mass. at 304. In the Webster case the recited language is pertinent to the legal principal that "malice is implied from any deliberate or cruel act against

another." With the exception of the implication to be drawn "from any deliberate or cruel act against another," the opinion contains no additional analysis of the origin of the "wicked and corrupt" language or any description of the circumstances that "carry in them the plain indications of a heart regardless of social duty, and fatally bent on mischief,"

The referred to language appears in Virginia in the 1925 case of Scott v. Commonwealth, 143 Va. 510, 519, 129 S.E. 360 (1925), in which the son of a town policeman was killed during a physical confrontation with a man who became enraged upon learning that several of his recent companions were arrested by the deceased's father. The defendant's outburst took place at a time at which he had not made any "enquiries as to why the custodian of the law had arrested his companions. The gravamen of the offense seemed to be that they had been by one whom he designated as a 'G d s o a b, a gambler and a bootlegger.'" Upon encountering the son after hearing the news about his companions' arrests the defendant provoked the son into throwing a punch and responded with deadly force in the ensuing scuffle. 143 Va. at 518-519. The Virginia Supreme Court quoted the entire passage from the Webster case, including the express relationship between the "wicked," "corrupt," "plain indications of a heart regardless of social duty," and "fatally bent on mischief" language and the inference of malice to be drawn from any deliberate or cruel act against another.

Three other Virginia cases contain references to the language derived from the Webster and Scott cases.

In Clinton v. Commonwealth, 161 Va. 1084, 172 S.E. 272 (1934), a first degree murder conviction was upheld under circumstances in which the defendant opened fire on officers

suddenly, inexplicably, and without any apparent reason disclosed by the evidence. 161 Va. at 1086-1088.

In Martin v. Commonwealth, 184 Va. 1009, 37 S.E. 2d 43 (1946), the second degree murder conviction of a wife was upheld under circumstances in which she was heard to say, "If I had a gun, I would kill you" when the couple had been observed to be getting along well to that point in the evening. The deceased husband went upstairs and returned with a shotgun. Almost immediately after returning and giving it to her - and a shell with which to load it - he was shot by his wife at close range. 184 Va. 1011-1013.

In Fletcher v. Commonwealth, 209 Va. 636, 166 S.E. 2d 269 (1969), two malicious wounding convictions were upheld under circumstances in which the defendant and three companions, who had been refused admittance to a birthday party, obtained a sawed-off shotgun and returned. For no apparent reason they brutally assaulted two attendees who were outside the residence when they returned with the firearm. The evidence disclosed no reason for the defendant's behavior towards the victims with the exception of generalized animosity toward those who were in attendance at the party from which he and his companions were excluded. 209 Va. at 271-272.

B.

The Court's Duty in Relation to Instructions

When considering the denial of jury instructions the Court must determine whether "the instructions cover all issues which the evidence fairly raises." Hunt v. Commonwealth, 25 Va. App. 395, 399, 488 S.E. 2d 672 (1997), citing Lea v. Commonweatlh, 16 Va. App. 300, 304, 429

S.E. 2d 477 (1993). On appeal the court is "bound by the principle that the accused is entitled, on request, to have the jury instructed (on a legal theory) that is supported by more than a 'scintilla of evidence in the record." 25 Va. App. 399-400, citing Bunn v. Commonwealth, 21 Va.App. 593, 599, 466 S.E. 2d. 744 (1996). Where "credible evidence exists that would support giving the jury an instruction on a particular theory of the case, the trial court's failure to give the instruction constitutes reversible error. 25 Va. App. at 400, citing McClung. Commonwealth, 215 Va. 654, 657, 212 S.E. 2d 290, 292-93 (1975); Martin v.Commonwealth, 13 Va. App. 524, 528 414 S.E. 2d 401, 403 (1992) (*en banc*).

While instructing the jury, however, it is error to include confusing or misleading instructions or language, Hubbard v. Commonwealth, 243 Va. 1, 15-16, 13 S.E. 2d 875 (1992), instructions that embody legal theories that are inapplicable to the facts as reflected in the evidence, Parnell v. Commonwealth, 15 Va. App 342, 345-346, 423 S.E. 2d 843 (1992), or those that are duplicative. Stevens v. Commonwealth, 89 Va. App. 117, 123, 379 S.E. 2d 469 (1989). A statement "made in the course of a judicial decision is not necessarily proper language for a jury instruction." Snyder v. Commonwealth, 220 Va. 792, 797, 263 S.E. 2d 55 (1980), cited in Yeager v. Commonwealth, 16 Va. App. 761, 766, 433 S.E. 2d 248 (1993). Though a statement contained in an instruction may be correct "as an abstract statement of law," it is an error to give it "unless there is sufficient evidence in the record to support it." Parnell, 15 Va. App at 346, citing Swift v. Commonwealth, 199 Va. 420, 100 S.E. 2d 9 (1957)

This case is not one in which the defendant was denied an instruction concerning a legal theory such as a lesser included offense that was fairly raised by the evidence. For example, in the Seegers case, in which the defendant claimed that he had no intent to knowingly and willfully

inflict bodily injury on a correctional officer who he assaulted, the Court of Appeals held that it was error deny his request for an instruction concerning the misdemeanor offense of assault and battery. Seegers v. Commonwealth, 18 Va. App 641, 644-645, 445 S.E. 2d 720 (1994).

This case is like the Hubbard case, in which the court was found to have correctly declined to instruct the jury on the issue of criminal negligence by including definitions of civil negligence and gross negligence. While one understand that alternative definitions of negligence might have the benefit of enabling jurors to see the hierarchy of degrees of negligence that culminate in criminal negligence, the Supreme Court held that the inapplicable principles related to civil cases would have created confusion and would have been misleading. Finding that the jury was correctly instructed on the issue of criminal negligence, the Court ruled that the requested instructions were "inapplicable to the facts and circumstances of the case..." 243 Va. at 15-16.

C.

Conclusion Regarding Malice Instruction

This is a case in which the requested language emphasizes a legal theory that was not raised by the evidence or argued by the parties at trial.

This is a case in which the requested language, upon careful scrutiny, is an incorrect statement of the law in that it suggests that proof of malice in all cases requires proof of a "wicked or corrupt motive" and "an evil mind and purpose and wrongful intention, " under circumstances that evidence "a heart regardless of social duty and fatally bent on mischief." The defense takes exactly this position in the supporting Memorandum at pages 43-44. Proof of

the elements contained in the requested language is said to constitute, in effect, an essential element of malice in every case. From that language the defense contended that any conviction based on malice requires proof that the defendant was wicked, had an evil mind, and possessed a heart "regardless of social duty and fatally bent on mischief." That simply is not the law.

At a minimum, when the defense requested language is inserted into the Model Instruction, it has a tendency to confuse and mislead the jury regarding the law of malice. That result is to be avoided in a case in which that legal theory is not raised by the evidence or argued by the parties.

VII.

Alleged Limitation of Medical Testimony Evidence

It was conceded at trial that defense counsel impermissibly acquainted Dr. Ronald Uscinski with testimony provided by Commonwealth expert witnesses. Defense counsel's actions were blatant and intentional. The purpose of the email communications in question was to gain an advantage when the witnesses testified. When this matter was brought to the Court's attention it was learned that the lead defense expert, Dr. Jan Leestma, unbeknownst to the Court and the Commonwealth, testified in the case after having been similarly provided with the substance of the Commonwealth's expert testimony before he took the stand. In Dr. Leestma's case the Commonwealth was deprived of any opportunity to assess during a proper hearing the effect of his exposure to the testimony of Commonwealth expert witnesses by defense counsel. During the hearing that was held before Dr. Uscinski was allowed to testify it was learned that defense counsel had not advised him of the rule on witnesses. Presumbly, Dr. Leestma was also

not advised of the rule. As a result, the Court and the Commonwealth were deprived of a crucial safeguard against abuse of the rule – the role that honorable witnesses themselves might play in preventing violations of the rule by being armed with the knowledge by which to recognize violations initiated by counsel, if they did not have that knowledge independently because of their status as professional expert witnesses.

Under the circumstances the Court would not have abused its discretion had it barred Dr. Uscinski's testimony entirely as a result of counsel's direct participation in intentionally exposing him to the substance of testimony offered by the Commonwealth's experts. The remedy fashioned by the Court was an appropriate intermediate measure that enabled Dr. Uscinski to offer testimony that was cumulative and supportive of the testimony given by his predecessor, Dr. Leestma.

Subject to the receipt of a transcript of the relevant proceedings and an authoritative determination of the issue, the Commonwealth's position is that Dr. Uscinski made a specific representation to the Court relating to the scope of his intended testimony and, after an appropriate hearing, was allowed to testify to what he described. The Commonwealth's position is that his statement in that regard was not contradicted by counsel at the time. The Commonwealth's position is that neither the excluded testimony nor a proffer of it acquiesced in by the Commonwealth was made by defense counsel at the time of the hearing, in its immediate aftermath, or before Dr. Uscinski was excused as a witness. The written proffer submitted days later was untimely and should not be considered by this Court or by any appellate court. As a result, the Commonwealth's position is that the record of this Court reflects that the defendant suffered no harm from the Court's decisions about Dr. Uscinski's status as a witness and the

testimony that he gave. He was allowed to testify to the jury as if the entire episode never occurred.

The status of Virginia law on this issue is fairly summarized in the case of Wolfe v. Commonwealth, 265 Va. 193, 576 S.E.2d 471 (2003), in which the Virginia Supreme Court said,

> We have held that a circuit court has discretion to decide whether a witness who violates an exclusion order should be prohibited from testifying. Brickhouse v. Commonwealth, 208 Va. 533, 537, 159 S.E. 2d 611, 614 (1968). 'Factors to be considered in resolving the question include whether there was prejudice to the defendant and whether there was intentional impropriety attributable to the prosecution. It is also pertinent whether the out-of-court comments concerned any substantive aspect of the case and whether they had any effect on the witness' testimony.' Bennett v. Commonwealth, 236 Va. 448, 465, 374 S.E. 2d 303, 314 (1988), *cert. denied*, 490 U.S. 1028 (1989).

265 Va. at 214.

In the Wolfe case the exclusion violation involved a Commonwealth witness who advised another potential Commonwealth witness of the cross examination to which he was subjected. The tainted witness was not called by the Commonwealth to testify, a development that put the defense in the potential position of having to cross examine their own witness in the event the defense unsuccessfully sought to have the testimony of the Commonwealth's witness stricken and requested a mistrial when the motion was denied. 265 Va. at 213-214. On appeal of the denial of the requested mistrial the Supreme Court noted the evidence was that neither witness was present when the rule on witnesses was given. As a result the impropriety could not be said to have been the result of intentional conduct on the part of the Commonwealth. The Court upheld the denial of the requested mistrial under the circumstances. 265 Va. at 214.

In Jury v. Commonwealth, 10 Va. App. 718, 395 S.E. 2d 213 (1990), the sole surviving eye witness to the events under consideration at trial was not allowed to testify for the defense

after it was learned that he remained in the courtroom during the testimony of other witnesses. The Court of Appeals specifically noted that there "was no showing that he did so other than through misunderstanding." It was "unquestioned" that the violation was unintentional on his part and that of defense counsel. As a result the Court found that the lower court abused its discretion in disallowing the witness' testimony at trial. 10 Va. App. at 721.

Virginia cases are consistent with those in other states where the violation is found to be "inadvertent," Commonwealth v. Scott, 496 Pa. 78, 436 A. 2d 161, 162 (1981), or where sanctions are imposed without any inquiry being conducted upon discovery of the transgression. People v. Melendez, 80 P. 3d 883, 887 (Colo. App. 2003). In such circumstances the imposition of sanctions is found be an abuse of discretion. The language and reasoning employed by Virginia courts is also consistent with that of other jurisdictions when it involves the consideration of intentional violations.

In Holder v. United States, 150 U.S. 91, 14 S. Ct. 10 (1893), the United States Supreme Court articulated the basic rule that,

> If a witness disobeys the order of withdrawal, while he may be proceeded against for contempt, and his testimony is open to comment to the jury by reason of his conduct, he is not thereby disqualified, and the weight of authority is that he cannot be excluded on that ground, merely, although the right to exclude under particular circumstances may be supported as within the sound discretion of the trial court.

150 U.S. at 92.

The Holder decision has been subsequently interpreted to mean,

> ....the court may not disqualify the witness merely because he disobeys the rule but that this alternative is available if particular circumstances are shown. From the better reasoned state court decisions we interpret these particular circumstances to mean some indication the witness was in court with 'the consent, connivance, procurement or knowledge of the appellant or his

> counsel. Holstein v. Grier, Tex.Civ.App., 262 S.W. 2d, 954, 955; see also People v. Tanner, 77 Cal. Ap. 2d 181, 175 P. 2d 26, and 6 Wigmore, Evidence Sec. 1842, Supp at 120.

United States v. Schaefer, 299 F. 2d 625, 631 (7th Cir. 1962).

This language and reasoning of the Holder and Schaefer cases were applied in United States v. Torbert, 496 F. 2d 154 (9th Cir. 1974), under circumstances in which the appellant, at the request of counsel to locate a witness to verify his story and resolve a conflict between his account and that of an accomplice, "recited the substance of his own testimony to the potential witness, who agreed to testify that Nosratian had indeed played pool at the club during the period in question." The Court of Appeals upheld the district court's disqualification of the witness and the exclusion of his testimony upon discovery of the violation of the court's direction that the witnesses not discuss their testimony with other witnesses. 496 F. 2d at 157-158. See also, United States v. Smith, Rec. No. 08-11474, 11th Cir., March 6, 2009 (An unpublished *Per Curiam* opinion uphold the disqualification of a defense witness who was found to have communicated with another witness who had already testified in the case. Both witnesses were eye witnesses to the material events involving the offense.).

From relevant state authorities it is clear that the direct participation by the defendant in the impropriety is not required to justify disqualification of a defense witness. Counsel's knowledge or participation is sufficient.

In Rowan v. State, 431 N.E. 2d 805 (Ind. 1982), the defense sought to call a law clerk of counsel who was present in the courtroom during the testimony of a police officer. The purpose of the testimony was to contradict testimony by the officer on a specific point. No request for exemption from the rule of exclusion was made on behalf of the clerk, as had been done by

counsel as to the defendant's mother. In light of the ample opportunity for the defense to cross examine the officer the appellate court ruled that the trial court did not abuse its discretion in disqualifying the law clerk as witness. 431 N.E. 2d at 817.

In Pierce v. State, 34 Md. App. 654, 369 A. 2d 140, *cert. denied*, 434 U.S. 907, 98 S. Ct. 307 (1977), the defense sought to call a witness who had been in the courtroom throughout the trial. The witness' testimony was intended to substantiate the defendant's own testimony, for which the witness was present in the courtroom. In light of the fact that defense counsel was aware of the witness' presence in the courtroom the appellate court upheld the trial court's disqualification of the witness. 369 A. 2d at 146.

In State v. Wright, 196 Wis. 149, 557 N.W. 2d 134 (1995), the defense desired to call a particular witness who the prosecutor referred to in opening as a potential witness. The witness remained in the courtroom throughout the trial and was not called by the state. Defense counsel was aware of the identity of the witness and the substance of any anticipated testimony he might give. The record reflected that the witness was himself ignorant of the issue and was not at fault. Denying the defense contention that a sanction could be applied only as to the witness himself, the appellate court sustained the trial court's ruling that counsel should have kept the witness from the courtroom if he had "any foreseeable belief" that he would call witness. Exclusion was a remedy left to the discretion of the trial court. 557 N.W. 2d at 138-139.

The violation in this case wasn't disclosed to the Court until after the lead expert for the defense testified and was excused. Two days later it was learned that he, too, was tainted by exposure to the same materials that were provided by defense counsel to its second expert and another -- Dr. Daniels -- who was being prepared for testimony or assistance to the defense or

defense experts. The emails were not social communications. They were not administrative updates on the progression of the trial proceedings. They contained descriptions of the substance of the testimony the Commonwealth adduced through its experts, who had been specially prepared to affirmatively address not only the cause of death, but also the preposterousness of the contention that Ms. Love's brain injuries were the result of cardiopulmonary resuscitation.

The violation in this case was resolved by the Court when the second expert witness, Dr. Uscinski, was permitted to testify. He did so consistently and cumulatively with respect to his similarly tainted predecessor, Dr. Leestma. Subject to the receipt of an authoritative transcript of the proceedings, it is the position of the Commonwealth that any mention in the record at the time of the topic of "reperfusion" injury was unaccompanied by any contemporaneous proffer acquiesced in by the Commonwealth or by an offer of proof through testimony by Dr. Uscinski regarding any additional topic. Under these circumstances there is no basis in the record to suggest that the defendant was deprived of any evidence on his behalf. His expert testified without the jury having any idea that his testimony or that of Dr. Leestma was tainted.

To the extent that any issue has been preserved by the defense regarding Dr. Uscinski's testimony and the topic of "reperfusion," such testimony was cumulative of Dr. Leestma's and its omission harmless.

Under the circumstances and the law Dr. Uscinski should not have been allowed to testify because of counsel's direct and intentional participation in the violation. Had that been the Court's determination at the time its exercise of discretion would not have been an abuse. It would have been reasonable and appropriate.

VIII.

Sufficiency of the Evidence

In resolving a motion to set a verdict aside on an evidentiary issue the Court may do so only if the "evidence is insufficient as a matter of law to sustain a conviction." Rules of the Supreme Court of Virginia, Rule of Court 3A:15(b). On the issue of the quantum of evidence to satisfy the beyond a reasonable doubt standard, the Court may set aside a verdict only when it appears that it is "plainly wrong" or "without evidence to support it." Toler v. Commonwealth, 188 Va. 774, 781, 51 S.E. 2d 210 (1949). In ruling on a motion for a new trial the court,

> ....cannot invade the province of the jury...by attempting to pass upon the credibility of the witness, to reconcile conflicting statements, or to determine the weight to be given the evidence of each. If there are conflicts or discrepancies in the evidence, it is the jury's province to reconcile them if possible, and, if not, the jury may give credence to the witness or witnesses who in their opinion are best entitled to it.

Updike v. Commonwealth, 184 Va. 863, 868, 36 S.E. 2d 519 (1946) (citations omitted).

A.

Grand Larceny

The evidence relating to proof of grand larceny presented a jury question on the issue of value that was resolved against the defendant by the jury.

The Commonwealth's proof of value of Yeardley Love's computer consisted of the calm, composed, and expert opinion of James Sacco, a businessman who for more than two decades has been the owner and operator of a retail store located in the heart of Charlottesville that is engaged in the business of selling used property to willing buyers. In support of his opinion regarding the value of Ms. Love's computer Mr. Sacco was able to describe to the jurors about and document with exhibits two comparable sales at his store that quantitatively validated his

opinion that the fair market value of the computer was more than $200.00 on the date of the offense. He recalled the sales with such detail that he was able to describe for the jurors that the computer that sold for a price closer to $200.00 had a specific problem with its battery that negatively affected its value. He was able to describe for the jurors the characteristics of his customers, who wanted an inexpensive, functional computer, and weren't concerned with performance characteristics. Mr. Sacco demonstrated he knew the business of buying and selling used property. He knew his customers. He knew how to value products for purchase or sale, including computers, and knew what they would sell for in the relevant market. It is unsurprising that the jurors found his testimony compelling on the issue of value and determined that there was proof of value beyond a reasonable doubt.

No contention is raised by the defendant that proof of value on the grand larceny charge was insufficient as a matter of law.

B.

Second Degree Murder

In the immediate aftermath of putting his foot through Yeardley Love's bedroom door to gain access the defendant began to assault her in the bed where she was sleeping. His actions toward her were intentional and volitional, not accidental. They resulted in multiple injuries that were visible from her head to her lower legs, including fatal brain injuries from blunt force trauma that were visible to the naked eye upon autopsy. From the defendant's own statement to police the jurors could see and hear that she was trying to get away from him throughout the attack. He described his behavior as only reflecting his desire to talk to her about their

relationship. In his video recorded statement he physically demonstrated as he described having her down on the floor with her head and face being ground into it.

The evidence was also consistent with the defendant having after the attack physically placed Yeardley Love in her bed and covered her up in a manner that would obscure her injuries from view. The physical evidence was consistent with Yeardley Love having been effectively incapacitated by the injuries the defendant inflicted, although she retained some level of metabolic processes for up to two hours before she expired. Her incapacitation provided the opportunity for the defendant to take her computer when he departed. The defendant's behavior in tossing it into a dumpster could not reinforce more clearly to the jurors his angry, callous, mean, and cruel disposition toward her at the time of the offense. The jurors could also see the similarity between the offense before the Court in this trial and an assault he committed in February 2010 when he physically restrained her with an arm around her neck to keep her from leaving on that occasion. When the defendant wanted to insist on having his way physical violence toward Yeardley Love was not unexpected.

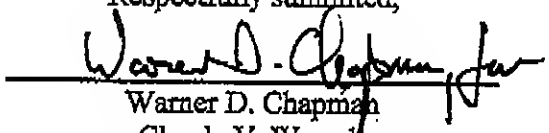
The elements of second degree murder were presented to the jury and resolved against the defendant by their verdict. Second degree murder requires proof that the defendant directly or indirectly killed Yeardley Love and that his actions were malicious. The defendant erroneously equates the absence of specific intent to kill with Yeardley Love's death being accidental. She died as a result of the defendant's intentional and volitional actions towards her that were undertaken with malice as defined by the Court's instructions. But for the defendant's actions Yeardley Love would have awakened May 3, 2010 and gone on with her life. It wasn't an accident. It was a second degree murder.

X.

Conclusion

For the reasons stated the Court should deny the relief requested by the defendant.

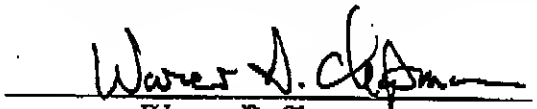
Respectfully summited,



Warner D. Chapman
Claude V. Worrell
For the Commonwealth

CERTIFICATE:

I, Warner D. Chapman, hereby certify that a true copy of the foregoing Response of the Commonwealth was delivered this 8th day of June, 2012 to the offices of Francis McQ. Lawrence and Rhonda Quagliana, counsel for the defendant, at 416 Park St., Charlottesville, VA (22902)



Warner D. Chapman